



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Power Systems Diesel Inc.

File: B-224635

Date: November 24, 1986

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### DIGEST

Bid not acknowledging material amendment must be rejected as nonresponsive. Verification/correction procedures for alleged mistakes in bid apply only to bids that are responsive on their face.

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### DECISION

Power Systems Diesel Inc. (PSDI) protests the award of a contract to Folk Construction Company (Folk) by the United States Army Corps of Engineers, New Orleans, Louisiana, under invitation for bids (IFB) DACW29-86-B-0067 for maintenance dredging of Bayou LeCarpe. PSDI's low bid of \$328,440 was rejected because it failed to acknowledge amendment Nos. 0001 and 0002 to the IFB. On August 27, 1986, award was made to Folk, the next low bidder in the amount of \$359,776.

We deny the protest.

The amendments in question were not sent to PSDI, which first became aware of the amendments and their contents on the bid opening date, August 6, 1986. PSDI states that it concluded that the amendments had no material impact on the project. Since the Corps indicated that it would not delay the bid opening, PSDI considered its understanding of the amendments in its bid price and marked "No Amendments Received" on its bid. On August 27, 1986, its bid was rejected by the Corps.

A bidder's failure to acknowledge a material amendment by bid opening renders the bid nonresponsive. Vertiflite Air Services, Inc., B-221668, Mar. 19, 1986, 86-1 C.P.D. ¶ 272; Power Service, Inc., B-218248, Mar. 28, 1985, 85-1 C.P.D. ¶ 374. An amendment is material where it would have more than a trivial impact on the price, quantity, quality or

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delivery of the item or services bid upon. Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.405(d)(2) (1985); Gibraltar Industries, Inc., B-218537.3, July 3, 1985, 85-2 C.P.D. ¶ 24.

In this case, amendment No. 0001 contained some immaterial clerical corrections, deleted the government's description of current site conditions, and changed the depth and the allowable tolerance for the dredging. Although this amendment resulted in an estimated 14,000 cubic yard reduction in the amount of material to be dredged, the Corps concluded that it could not associate this net reduction with any cost impact on the bid price because of the varying dredging equipment and methods that bidders could utilize. Although the Corps characterizes this amendment as material, we need not decide this issue, since, as discussed below, amendment No. 0002 is clearly material.

Amendment No. 0002 removed the most desirable and economical spoil disposal area "C" from being used by the contractor until disposal areas "A" and "B" were filled. Prior to this amendment, the contractor could utilize any of these government furnished disposal areas. The Corps estimates the increased costs associated with the restriction on use on disposal area "C" as \$10,000. PSDI states that when it was apprised of this change, prior to bid opening, it "adjusted the bid by a \$7,000 increase to accommodate the preparation of disposal site 'A,' since disposal site 'C' was not available."

In view of the relative closeness of the bid prices (\$328,440 and \$359,776) and since the impact of this amendment (\$7,000 to \$10,000) on price is not trivial, amendment No. 0002 is material and PSDI's failure to acknowledge it rendered the bid nonresponsive. Marino Construction Co., Inc., 61 Comp. Gen. 269 (1982), 82-1 C.P.D. ¶ 167; M.C. Hodom Construction Co., Inc., B-209241, Apr. 22, 1983, 83-1 C.P.D. ¶ 440. Even conceding that the bid would be low after accounting for the amendment's price impact, such a nonresponsive bid cannot be accepted. Id.

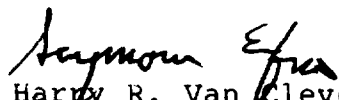
The fact that PSDI accounted for the contents of the amendments in preparing its bid does not make its bid responsive, since it specifically indicated in its bid that no amendments were received. We have recognized that amendments can be constructively acknowledged where an essential item contained only in the amendment is included in the bid. 34 Comp. Gen. 581 (1955); Protimex Corp., B-204821, Mar. 16, 1982, 82-1 C.P.D. ¶ 247. However, in this case PSDI's specific notation in its bid "No Amendments Received" makes

the constructive acknowledgment exception inapplicable, since PSDI, in our view, would not be legally bound to perform in accordance with the terms of the amendment by virtue of those words, and the government would bear the risk that performance would not meet its needs. Marino Construction Co., Inc., 61 Comp. Gen., supra; N.B. Kenney Co., Inc., B-220436, Feb. 4, 1986, 86-1 C.P.D. ¶ 124.

The protester argues that its failure to acknowledge the amendment should have been processed as the correction of a mistake in bid under FAR, 48 C.F.R. § 14.406-1. However, the verification/mistake provisions of the FAR only apply to bids that are responsive on their face; these provisions are not available to cure nonresponsive bids. Vertiflite Air Services, Inc., B-221668, supra; Avantek, Inc., B-219622, Aug. 8, 1985, 85-2 C.P.D. ¶ 150. A bid that is nonresponsive may not be corrected after bid opening, since the nonresponsive bidder would receive the competitive advantage of choosing to accept or reject the contract after bids are exposed by choosing to make its bid responsive. Id.

It is well-established that the bidder bears the risk of nonreceipt of a solicitation amendment unless it is shown that the contracting agency made a deliberate effort to exclude the bidder from competing. TCA Reservations, Inc., B-218615, Aug. 13, 1985, 85-2 C.P.D. ¶ 163. In this case, - the Corps has indicated that the failure to provide PSDI with these amendments was not deliberate, but rather was the result of a clerical mistake. The Corps contract specialist states that she cautioned PSDI to acknowledge the amendments in its bid when she talked with PSDI prior to bid opening. Under the circumstances, since PSDI has not alleged or demonstrated that there was any conscious or deliberate effort on the part of the Corps to exclude PSDI from the competition, its bid must be rejected as nonresponsive. Rocky Mountain Trading Co., B-220718, Jan. 28, 1986, 86-1 C.P.D. ¶ 99.

PSDI's protest is denied. PSDI claims its lost profits on the project, plus all the expenses incurred in relation to the preparation of its bid and filing the protest. Since PSDI's protest is denied, its claims for bid preparation and protest filing costs are denied. 4 C.F.R. § 21.6(e) (1986); A&A Realty, Inc., B-222139, June 20, 1986, 86-1 C.P.D. ¶ 575. In any case, there is no legal authority which would permit the recovery from the government of anticipated profits. A&A Realty, Inc., B-222139, supra.

*for*   
Harry R. Van Cleve  
General Counsel